Chapter 4

Technical Advice

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INTERNAL REVENUE SERVICE
TAX EXEMPT AND GOVERNMENT ENTITIES

Overview

Introduction

The purpose of this chapter is to provide the Employee Plans Determination Specialists guidance on processing technical advice cases. Technical Advice is advice or guidance furnished by the headquarters office as to the interpretation and proper application of internal revenue laws, regulations, revenue rulings, notices or other precedents published by the Headquarters Office to a specific set of facts. Technical Advice helps Service personnel close cases and maintain consistent holdings. Technical Advice may be used for unusual or complex issues that warrant consideration by the headquarters office. Technical Advices are case or taxpayer specific and may not be relied on by a different taxpayer.

This chapter is oriented towards the processing of Technical Advice by EP Determinations Specialists. Thus, those parts of the Technical Advice process in which EP Determinations personnel infrequently participate are not addressed, e.g., Headquarters' conferences subsequent to a pre-submission conference, and the preparation of the Technical Advice memorandum.

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Overview, Continued

Contents This chapter contains the following topics:

Objectives By the end of this lesson, you will be able to:

1. Define technical advice,
2. Identify the types of technical advices cases,
3. Understand when technical advice should be requested,
4. Understand the pre-submission conferences,
5. Understand the processing steps involved, and
6. Understand the special procedures for cash balance conversions of traditional defined benefit plans.

What Is Technical Advice?

Definitions

There are two types of technical advice:

- Technical advice memorandum (TAM)
- Technical expedited advice memorandum (TEAM)

For purposes of processing Employee Plans Determination cases, "**TAM**" means advice or guidance furnished by the Employee Plans Technical office, (herein referred to as "EP Technical"), as to the interpretation and proper application of internal revenue laws, regulations, revenue rulings, notices, or other precedents published by the headquarters office to a specific set of facts.

For purposes of processing Employee Plans Determination cases, "**TEAM**" means technical advice issued in an **expedited** manner. A TEAM has several characteristics that are different from a TAM, including a mandatory pre-submission conference, which will be discussed later. The procedures associated with a TEAM help expedite certain aspects of the TAM process and eliminate some of the requirements that may delay the TAM process.

Authority

Rev. Proc. 2004-5, IRM and QAB

Revenue Procedure 2004-5 (revised annually) provides the general guidelines for requesting technical advice.

Additional guidance can be found in **Internal Revenue Manual sections 7.1.5, 7.11.1,** and the **Quality Assurance Bulletin (QAB) FY 2004-4**, dated June 24, 2004. The Manual and the QAB should be used as supplements to the Revenue Procedure when processing technical advice cases.

Recent Changes to Technical Advice

Adoption of TEAM	Revenue Procedure 2004-5 adopts the use of technical expedited advice memorandum (TEAM) for matters within the jurisdiction of the Commissioner, Tax Exempt and Government Entities Division.
Cases that are no longer mandatory Tech Advice	Termination/reestablishment and spin-off termination cases are no longer mandatory technical advice cases.
Mandatory Pre-Submission Conferences	A pre-submission conference is mandatory in all cases other than mandatory TAMs. Pre-submission conferences play an integral part in promoting expeditious processing of requests for a TAM or a TEAM and are discussed in detail later in the chapter.
Expanded the meaning of reconsidera-tion	Section 17.02 of the Revenue Procedure was expanded upon with respect to what is meant by the "reconsideration" of a TAM or a TEAM.
Electronic Filing	The pre-submission materials must be submitted electronically regardless of whether the pre-submission conference pertains to a TAM or TEM request. To protect taxpayer information, the EP office assigned to the request must electronically transmit (i.e. using the IRS firewall) the pre-submission materials. The Form T5565 for a TAM or TEAM request must also be submitted electronically, along with the accompanying documents (to the extent feasible, followed by a hard copy if requested by the assigned group).
Procedural changes	If you have worked with Technical Advice in the past, you should note the above changes to the procedures effective with Revenue Procedure 2004-5.

Who is Responsible for Requesting TAMs and TEAMs

The Service

Generally, the Service will determine when to request a TAM or a TEAM on an issue. This decision must be coordinated in conjunction with the specialist and their group manager. Assistance, when necessary, may be obtained by contacting the EP Determinations Quality Assurance Staff (QAS). In addition, each request must be submitted through the proper channels and approved by the manager of EP Determinations QAS.

Taxpayer requesting technical advice

While a case is under the jurisdiction of EP Determinations, a taxpayer may request that an issue be referred to the EP Technical office for a TAM or a TEAM. However, the taxpayer cannot mandate a request for Technical Advice.

Taxpayer can request reconsideration if specialist denies request

If the request for Technical Advice is denied by the specialist, the taxpayer may request reconsideration of the specialist's decision. The request must be in writing and be submitted within 10 calendar days after being informed of the decision not to seek Technical Advice.

Steps taken by specialist with respect to reconsideration

The specialist will forward the taxpayer's request to the EP Determinations Manager in conjunction with the QAS. A specialist should contact QAS to determine whether the issue has been previously addressed and whether the issue was sent for Technical Advice. The QAS reviewer could also give his or her opinion as to whether this is the kind of issue that warrants Technical Advice treatment.

Once all these steps are taken, the agent, with the group manager, would recommend that a Technical Advice request be prepared. If the EP Determinations Manager along with QAS determines that a Technical Advice is not warranted and proposes to deny the request, the taxpayer is informed in writing about the determination. The taxpayer has 10 calendar days after receiving the letter to notify the EP Determinations Manager of agreement or disagreement with the proposed denial.

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Who is Responsible for Requesting TAMs and TEAMs,
Continued

Taxpayer does not agree with the proposed denial from EP Determinations Manager

The taxpayer may not appeal the decision of the EP Determinations Manager not to request a Technical Advice. If the taxpayer does not agree with the proposed denial to seek Technical Advice, all data on the issue for which the Technical Advice has been sought will be forwarded to the Commissioner, Tax Exempt and Government Entities Division.

The Commissioner, through the Director, Employee Plans, will review the proposed denial solely on the basis of the written record, and no conference will be held with the taxpayer or the taxpayer's representative. The Director will notify EP Determinations within 45 days of receiving all of the data regarding the Technical Advice whether the proposed denial is approved or disapproved. EP Determinations will then notify the taxpayer.

When should a TAM or TEAM be requested?

Lack of Uniformity of Position

A TAM or TEAM should be requested when there is:

- a lack of uniformity regarding disposition of an issue, or
- an issue sufficiently unusual or complex to warrant consideration by EP Technical.

Except for mandatory Technical Advice described below, Technical Advice will only be requested on an issue when there is disagreement between the Service and the taxpayer and published guidance provides no clear answer either way.

Any Remaining Issues

Generally, before a TAM or TEAM is requested, the case should be worked to completion on any remaining issues, if possible. Therefore, if additional issues need consideration for Technical Advice, these can be handled at the same time with the same request. However, there may be instances where resolution of remaining issues is not feasible, such as a cash balance conversion plan.

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When should a TAM or TEAM be requested?, Continued

Mandatory TAMs

Technical advice must be requested in the following situations:

1. Proposed adverse determination letters or proposed revocation letters on collectively bargained plans;

2. Plans for which the Service is proposing to issue a proposed revocation letter because of certain fiduciary actions that violate the exclusive benefit rule of IRC § 401(a) and are subject to Part 4, Subtitle B of Title I of ERISA;

3. Amendments to defined contribution plans pursuant to Rev. Proc. 2004-15, 2004-7 I.R.B. 490, in connection with a waiver of the minimum funding standard and a request for a determination letter;

4. Defined benefit plans that have been amended to convert an existing defined benefit formula to a cash balance type benefit formula that was not previously subject to a TAM on the conversion, and

5. Cases requiring Headquarters Office approval pursuant to IRC § 7805(b) relief.

NOTE: A TEAM is not permitted for cases involving mandatory technical advice.

Pre-Submission Conferences on TAMs and TEAMs

Purpose of Pre-Submission Conference

A pre-submission conference is intended to facilitate agreement between the parties as to the appropriate scope of a TAM or TEAM request. The conference is a way to informally discuss the issues in which the Service and taxpayer disagree, and provides all parties an opportunity to argue their point of view. A pre-submission conference is not intended to create an alternate procedure for determining the merits of the substantive positions advocated by EP Determinations or the taxpayer. The taxpayer and his/her representative should be encouraged to participate in the conference.

Pre-submission conferences are required in all cases except mandatory technical advice. The pre-submission conference is used to determine:

- the tech advice issues,
- whether technical advice is appropriate to resolve the issues, including whether the issues are appropriate for a TEAM, and
- determine what information and documents will be required when the technical advice is submitted.

If there are different Service functions involved in the process, all must agree that the TEAM procedures are appropriate; otherwise the request will be processed subject to the procedures for a TAM.

All Parties Agree to Request the Pre-Submission Conference

If the EP Determinations Group and QAS determine that a TAM or TEAM request is likely, a request for a pre-submission conference should be made. To promote expeditious processing of TAM or TEAM requests, EP Technical generally will discuss the issues with the originating EP Determinations group and/or QAS and the taxpayer prior to the time any request for technical advice is formally submitted to EP Technical. **Note:** Other than mandatory TAMs, as discussed earlier, a pre-submission conference is mandatory in all cases.

Taxpayer participation is not required for a TAM, but is required for a TEAM. If the Taxpayer chooses not to participate, a TEAM will usually be treated as a TAM. Also, if the request for a TAM or TEAM will involve more than one Service function, representatives from each function must participate in the pre-submission conference.

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Pre-Submission Conferences on TAMs and TEAMs, Continued

Pre-Submission Conference must be in Writing

A request for a pre-submission conference must be submitted in writing by the EP Determinations office. The request should identify the office expected to have jurisdiction over the request for a TAM or a TEAM. The request should include a brief explanation of the primary purpose so that an assignment to the appropriate group can be made. The written materials must be submitted electronically to the extent the appropriate documents are available to be submitted electronically through the Service as discussed in this chapter.

Pre-submission Conference Package

The specialist will route the Pre-Submission Package to QAS. The Pre-Submission Conference Package will include:

- a cover memo requesting a technical advice pre-submission conference;
- draft of the issue statement;
- Form 2848, Power of Attorney, if applicable;
- the taxpayer's written statement (required if TA is initiated by the taxpayer); and
- additional work papers or other information relevant to the technical advice.

Timeframe (Arrangement)

The Headquarters' group assigned responsibility for conducting the pre-submission conferences will contact EP Determinations QAS to arrange a mutually convenient time for parties to meet:

- TAMs – **5** working days after receipt by EP Technical.
- TEAMs – **2** working days after receipt by EP Technical

Timeframe (Pre-Submission Conference Material)

Pre-Submission conference materials must be received at least:

- TAMs – **10** working days prior to the conference
- TEAMs – **5** calendar days prior to the conference

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Pre-Submission Conferences on TAMs and TEAMs, Continued

Timeframe (Pre-submission conference held)

The pre-submission conference must generally be held within:

- TAMs – **30** calendar days after contact
- TEAMS – **15** calendar days after contact

Generally, pre-submission conferences for TAMs and TEAMS are held by telephone with EP Technical unless the parties specifically request that the conference be held in person. In no event will the request for an in person pre-submission conference on a TEAM be allowed to delay the conference beyond the **15-day** period.

Submission of Pre-Submission Materials Electronically

TAM or TEAM pre-submission conference materials must be submitted electronically unless the materials cannot be submitted electronically.

Other Means of Submitting Materials

Only if the supporting materials cannot be submitted by e-mail, such materials should be sent by fax, express mail, or private delivery to the tax law specialist or actuary in Headquarters assigned to the request. See section 10.05 of Rev. Proc. 2004-5 if material cannot be submitted electronically.

Pre-Submission Conference Not To be Recorded

Since the pre-submission conference procedures are informal, no party may make a tape, stenographic, or other verbatim recording of the conference.

No 7805(b) Relief on Pre-Submission Conferences

Any discussion of substantive issues at a pre-submission conference is advisory only. Therefore, issues discussed are not binding on the Service, and cannot be relied upon as a basis for obtaining retroactive relief under the provisions of IRC § 7805(b).

Information included in a Technical Advice Request

Issue Statement

Whether initiated by EP Determinations or the taxpayer the request for Technical Advice must include an issue statement. An issue statement provides the facts and issues for which the Technical Advice is being requested. The Technical Advice must clearly include the applicable law and arguments supporting both the position of EP Determinations and the position of the taxpayer.

If tech advice is initiated by Service

If the request for Technical Advice is initiated by the Service, the specialist prepares the issue statement and sends a copy to the taxpayer for review of the Service's position on the issue. The taxpayer has 10 calendar days to provide a written statement specifying any disagreements on facts and issues. Any request for an extension by the taxpayer must be justified in writing.

If tech advice is initiated by Taxpayer

If the request for Technical Advice is initiated by the taxpayer, the taxpayer must submit a written statement:

- stating the facts and issues,
- explaining the taxpayers position,
- discussing any relevant statutory provisions, tax treaties, court decisions, regulations, revenue rulings, revenue procedures, notices, or any other authority supporting the taxpayer's positions, and
- stating the reasons for requesting the Technical Advice.

Copies of TAMs

QAS has placed copies of recently issued Technical Advice Memorandums on the EP Determinations QAS Intranet web page. These TAM's can be used as a guide in preparing a Technical Advice package. See Exhibit #1 for a sample Technical Advice from the QAS web page.

Preparation of Letter 1399

The taxpayer will be notified of a request for Technical Advice by means of Letter 1399 DO. The Letter 1399 DO is generated on EDS using selective paragraph number 4. See Exhibit #2.

Submission of Letter 1399

Upon completion of the pre-submission conference, the case will be returned from QAS for the issuance of the Letter 1399 DO and resolution of any other issues identified. The taxpayer will be given 10 workdays to respond to the letter.

Processing Steps

Form T5565, Request for Technical Advice

The EP Specialist will complete Form T5565, Request for Technical Advice – TE/GE and include the Form T5565 with the request for Technical Advice. Form T5565 will serve as the index to the Technical Advice request.

Preparation and Order of Technical Advice Package

The EP Specialist will prepare an original and, if necessary, two separate copies of the Technical Advice package to be sent to QAS. The Technical Advice package will be tabbed and assembled in the following order

1. Form T5565

A new Form T5565 was included with the issuance of QAB 2004-4. Form T5565-Request for Technical Advice-TEGE should be used. (See Exhibit #3).

2. Form 2848, power of attorney, if applicable

Form 2848, Power of Attorney (if applicable). If Form 2848 is used, ensure that:

- the form 2848 is the most current version of the form and is properly executed, and
- the representative is an attorney, accountant, enrolled agent or enrolled actuary.

Unenrolled return preparers may not represent taxpayers in matters before the Headquarters Office.

3. Statement whether taxpayer desires a conference

Statement as to Whether Taxpayer Desires a Conference. When a taxpayer is notified of a pending request for technical advice, the taxpayer should also be notified of the right to a conference in the Headquarters Office if an adverse decision is indicated. The taxpayer should be asked to state whether such a conference is desired, and such statement should be included in the submission to the headquarters office.

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Processing Steps, Continued

4. Statement of Facts and Questions Regarding the Service's Position

When the Service initiates a request for technical advice, a statement of facts and specific issues is generally provided to the taxpayer so that the taxpayer can indicate any areas of disagreement. Prior to referral to the headquarters office, the EP Specialist should, to the extent possible, try to reach agreement with the taxpayer on the facts and issues. The statement that is attached to the Form T5565 should be a complete copy of the most up to date version of the Service's position, revised to reflect agreement reached on any facts and issues. Please check the statement for missing pages and omitted text. Previous versions of the statement of facts and issues that were submitted to the taxpayer for comment should be included in the administrative file.

5. Position and Statement or Response of Taxpayer

When the Service provides the taxpayer with a statement as to the facts and issues, the taxpayer is asked to indicate areas of agreement and/or disagreement. In addition, a taxpayer may submit statements explaining their positions on the issues, citing precedents that they believe apply to their case. They are also encouraged to comment on any legislation, tax treaties, regulations, revenue rulings, revenue procedures or court decisions contrary to their position. A complete copy of the most recent taxpayer statement and/or response should be attached to the Form T5565, as well as any previous responses to prior versions of the Service's statement of facts and issues.

6. Statement of law and argument

The EP Specialist should prepare:

- a statement that discusses each issue being presented,
- the relevant authority upon which the Service's position is based, and
- an analysis of the facts in light of that authority, referring, if possible, to the specific facts and documents found in the administrative file. This statement may be included as part of the Statement of Facts and Questions Regarding the Service's Position.

With respect to the law section, only the pertinent regulation or other published guidance should be cited. The argument section should include how the agent interprets the law to the particular set of facts, which gives the tax law specialist or actuary in headquarters the rationale of EP Determination's position.

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Processing Steps, Continued

7. Statement of proposed deletions

A statement of proposed deletions must be submitted with requests for technical advice to which section 6110 of the Code applies. Such statement need not be submitted with requests for technical advice to which section 6104 of the Code applies. Pursuant to section 6110, most technical advice and any related background file documents will be open to public inspection. However, certain information shall be deleted from such documents by the Service prior to their being made available for public inspection.

To help the Service make the deletions required, the taxpayer must provide a statement indicating the deletions desired. Pursuant to section 6104(a) of the Code, an application filed with respect to the qualification of a pension, profit-sharing, or stock bonus plan, or an individual retirement arrangement, or the exemption from tax of an organization forming part of such a plan or arrangement will also be open to public inspection, but with little, if any, information deleted from the application.

A statement of proposed deletions is generally not required to be included with technical advice requests involving issuance or denial of a determination letter, continuing plan qualification, or revocation or modification of a prior favorable determination letter. A statement is generally required to be included with requests involving deductibility or taxability.

A statement of proposed deletions should be provided for any case for which it is not clear whether or not section 6110 applies.

8. Statement of Existence of pending technical advice request

If any other request for technical advice with respect to the taxpayer is currently pending in the headquarters office, a statement should be prepared which identifies such pending request so that headquarters office can coordinate processing of the requests, if appropriate.

9. Prior determination letter

If the taxpayer previously received a determination letter or letters, attach a copy of each such letter.

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Processing Steps, Continued

10. Statement regarding revocation or modification of Ruling or Determination Letter

If the request for technical advice involves revocation or modification of a ruling or determination letter, a statement should be prepared which identifies the recommended effective date of revocation or modification and which states the reasons for such recommendation.

11. Statement as to whether issue arose in prior case

If any issue involved in the request for technical advice was involved in a prior request for technical advice, a statement should be prepared which explains the disposition of the prior case, including whether there was a revocation or modification or a ruling or determination letter. Sufficient information regarding any prior case should be provided so that the Headquarters Office can identify the prior case and consider consistent treatment, if appropriate.

12. Adminis-trative file

The administrative file should contain the original Technical Advice package and (if the material cannot be sent by e-mail or by fax) two separate copies of all supporting documents and pertinent material organized either in chronological order or by subject (i.e. if there is more than one questionable transaction or more than one issue, documents may be ordered by transaction or issue). All documents should be tabbed, and a document index listing each document and its tab number should be placed on top of the file. The original documents should be sent electronically, if possible, to EP Technical in Washington, D.C.

13. Statement of existing issues pending before DOL or PBGC

If the technical advice request involves any issue or issues currently pending before the DOL or the PBGC, a statement should be prepared which identifies such issue or issues and which provides information regarding their status and any coordination between EP Determinations and the other agency. In addition, in cases involving DOL, statements should be included as to whether DOL was notified of the case and whether DOL has commenced an examination.

NOTE: When indexing the hard copy of the Technical Advice Package, use permanent tabs or dividers, not Post-it notes, to index the package. For the electronic files, the file name should be so named to accurately reflect the contents of the file.

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Processing Steps, Continued

Submission of Technical Advice Package

Unless sent electronically via e-mail or via fax, Quality Assurance Staff will send two copies of the Technical Advice package to EP Technical, and will retain the remaining copy. Hardcopies that cannot be sent via e-mail should be faxed, express mailed, or sent via private delivery service.

Special Procedures for Cash Balance Plans

Authority

The Headquarters field directive dated September 15, 1999 and section 4.04 of Revenue Procedure 2004-5 require mandatory technical advice on all traditional defined benefit plans converted to a cash balance formula unless the conversion was previously subject to technical advice.

Suspense Order

On March 24, 2004, the Chief, EP Determinations issued a Cash Balance Conversion Suspense Order. In accordance with the Suspense Order, these cases should be suspended at the group level and the plan sponsors/POAs notified in writing. Cases will be suspended prior to working any of the other determination issues. Subsequently, in Announcement 2004-57, 2004-27 I.R.B. 15, the Service announced its intention to withdraw the proposed age-discrimination regulations issued under sections 411(b)(1)(H) and 411(b)(2) of the Code in December 2002. The last paragraph of that announcement states that the Service will not process the pending, mandatory technical advice cases while the cash balance and cash balance conversion issues are under consideration by Congress.

Current plan, prior benefit formula & actuarial assumptions

The Technical Advice package should include copies of the plan document, including the benefit accrual formula and actuarial assumptions from the plan prior to the conversion. These copies should be part of the administrative section of the Technical Advice package and included with the case file when it is ready for final submission.

Exhibit #1

INTERNAL REVENUE SERVICE
EMPLOYEE PLANS
TECHNICAL ADVICE MEMORANDUM
FOR MANAGER, EP DETERMINATIONS QUALITY ASSURANCE

Name of Taxpayer. ABC Corporation

Taxpayers' Address:

Taxpayers' Identification Number--

Years Involved: PYE 200212

LEGEND

Company A- ABC Corporation

State B:
Plan X ABC Corporation 401 (k) Savings Plan (Plan #003)
Date 1: September 6
Date 2: October 30
Date 3: January I

ISSUES:

1. Whether the Plan X document constitutes both a stock bonus plan and a profit-sharing plan requiring the filing of a separate Form 5300, Application for Determination for Employee Benefit Plan for each plan; and

2. whether the matching employer contribution, formula set forth in § 2.2.1 of Plan X satisfies the § 401(k) of the Internal Revenue Code (Code) safe harbor requirements with respect to the portion of the Plan X document that is an employee stock ownership plan (ESOP), and with respect to the portion of Plan X that is not an ESOP where salary deferrals and matching employer contributions may be made to both portions of Plan X and where such Plan X is subject to mandatory disaggregation.

Exhibit #1

FACTS:

Company A, a State B company, sponsors Plan X a defined contribution (DC) plan. The Plan's most recent favorable determination letter is dated Date 1, 1996. Plan X's Plan yew is the calendar year.

On Date 2, 2001, Plan X was amended and restated effective Date 3, 2002. § 1.33 of the restated Plan X defines "Plan" as Plan X as herein set out or as duly amended. "That portion of Plan X consisting of the ESOP accounts, the PAYSOP accounts and the Company A stock fund accounts (as defined in § 7.1.6) shall constitute a stock bonus plan and an employee stock ownership plan within the meaning of § 4975(e)(7) of the Code...The remainder of the plan shall constitute a profit sharing plan".

The effect of the Date 2, 2001 amendment and restatement was to convert a portion of Plan X to an ESOP. The ESOP portion of plan X consists of all plan assets invested in common stock of Company A. The non-ESOP portion of Plan X consists of all other Plan X assets (i.e. all assets not invested in Company A stock). All Company A employees are eligible to participate in both the ESOP and non ESOP portions of Plan X

A Plan X participant directs where all or a portion of his or her salary reduction contributions are to be directed. In correspondence dated August 19, 2003, Company A's authorized representative assets that a Plan X participant initially makes a single contribution rate election (i.e., a Plan X participant initially does not make separate elections for both the ESOP and non-ESOP portions of Plan X). Once the contribution rate election is made, the Plan X participant must then elect how to have his contributions invested in Plan X. A Plan X Initial Enrollment Benefits Phone Worksheet which accompanied the August 19, 2003, correspondence provides, in relevant part, that
"…You will first be asked to specify your contribution rate, and then you will be asked how you would like your future investments to be allocated…" The Company A Common Stock Fund is one of a number of funds into which a Plan X participant may place his/her contributions.

When a Plan X participant directs that all or a portion of his or her salary reduction contributions be invested in Company A stock, Company A contributes that portion of the participant's salary reduction contributions to the ESOP portion of Plan X. Company A contributes the remaining portion of the participant's salary reduction contributions to the non-ESOP portion of Plan X. Company A also makes corresponding matching contributions on behalf of the participant to both the ESOP portion of Plan X and the non-ESOP portion of Plan X

The relevant Form 5300, Application for Determination for Employee Benefit Plan characterizes Plan X as a profit-sharing plan. The relevant Form 5309, Application for Determination of Employee Stock Plan, also characterizes Plan X as a profit-sharing plan.

Exhibit #1

Section 2.2.1 of Plan X Provides that Company A will make a "basic matching contribution" and a "supplemental matching contribution for each payroll period on behalf of each Plan X participant. The "basic matching contribution" is equal to 100% of the amount of the salary reduction contribution made on behalf of such contribution during such payroll period up to 4% of his/her compensation with respect to such payroll period. The "supplemental matching contribution" is equal to 100% of the amount of the salary reduction contribution made on behalf of such participant during such payroll period in excess of 4% but not in excess of 6% of his/her compensation with respect to such payroll period.

In a letter dated January 23, 2003, Company A's authorized representative asserts that "…All of the Plan assets an available to pay benefits to Plan participants and their beneficiaries. The fact that separate accounts are maintained on behalf of participants (e.g., ESOP accounts, PAYSOP accounts, salary reduction contribution (before-tax) accounts, Employer profit-sharing contribution accounts, etc) does not cause the plan to fail to be a single plan..." We note that sections 4 and 5 of Plan X, which deal with distributions to plan participants, are consistent with this assertion.

LAW

Issue 1:

Section 1.401-1(b)(1)(ii) of the Income Tax Regulations provides that a profit-sharing plan is a plan established and maintained by an employer to provide for the participation in his profit by his employees or their beneficiaries. The plan must provide a definite predetermined allocation formula for allocating contributions made to the plan and for distributing the funds accumulated under the plan after a fixed number of years, the attainment of a stated age, or upon the occurrence of some event such as a layoff illness, disability, retirement death, or severance of employment

Section 1.401-1(b)(1)(iii) of the regulations defines a stock bonus plan as a plan similar to a profit-sharing plan, except that the contributions by the employer are not necessarily dependent upon profits and the benefits are distributable in stock of the employer.

Section 54.4975-11(a)(5) of the regulations states that an ESOP may form a portion of a plan the balance of which includes a qualified pension, profit-sharing, or stock bonus plan which is not an ESOP. A reference to an ESOP includes an ESOP that forms a portion of another plan.

Code § 414(l) provides the rules governing mergers and consolidations of plans or transfers of plan assets.

Section 1.414(l)-l(b)(1) of the regulations defines a plan as a "single plan" if, and only is, on an ongoing basis, all of the plan assets are available to pay benefits to employees who are covered by the plan and their beneficiaries.

Exhibit #1

Section 1.414(l)-l (b)(1) of the regulations also provides that a plan will not fail to be a "single plan" merely because of the following:

(i) The plan has several distinct benefit structures which apply either to the same or different participants;
(ii) The plan has several plan documents;
(iii) Several employers, whether or not affiliated, contribute to the plan;
(iv) The assets of the plan are invested in several trusts or annuity contracts; or
(v) Separate accounting is maintained for purposes of cost allocation but not for purposes of providing benefits under the plans.

However, more than one plan will exist if a portion of the plan assets is not available to pay some of the benefits. This will be so even if each plan has the same benefit structure or plan document, or if all or part of the assets are invested in one trust with separate accounting with respect to each plan,

Section 6.07 of Revenue Procedure 2002-6, 2002-1 IRB. 203 (January 7, 2002), provides, in relevant part, that (a) separate application is required for each single plan within the meaning of Code § 414(1).

Issue 2-

Section 1433(a) of the Small Business Job Protection Act of 1996 (SBJPA), Public Law 104-488, added sections 401(k)(12) and 401(m)(11) to the Code effective for plan years beginning after December 31, 1998. These Code sections provide design based safe harbor methods for satisfying the Average Deferral Percentage (ADP) test contained in Code § 401(k)(3)(A), and the Average Contribution Percentage (ACP) test contained in Code § 401(m)(2).

Code § 401(k)(12) is titled “Alternative methods of meeting discrimination requirements". . Code § 401(k)(12)(A) provides, it relevant part that a cash or deferred arrangement shall be treated as meeting the requirements of paragraph (3)(A)(ii) (the ADP test) if such arrangement -(i) meets the contribution requirements of subparagraph (B) or (C)-

Code § 401(k)(12)(F) provides that an arrangement shall be treated as meeting the requirements under subparagraph (A)(i) if any other plan maintained by the employer meets such requirements with respect to employees under the arrangement.

Notice 98-52, Cash or Deferred Arrangements; Nondiscrimination was published at 1998-2 C.B. 634. § I of Notice 98-52 indicates that the notice is intended to provide guidance on the design-based alternative or “safe-harbor” methods in sections 401(k)(12) and 401(m)(11) of the Internal Revenue Code for satisfying the Code sections 401(k) and 401(m) nondiscrimination tests.

Exhibit #1

Section V.B of Notice 98- 52 provides certain harbor contribution requirements. § IX A.1 of Notice 98-52 provides that safe harbor matching or nonelective contributions may be made to the plan that contains the CODA or to another defined contribution plan that satisfies either § 401(a) or 403(a).

Section IX. A.4 of Notice 98-52 provides that safe harbor matching or elective contributions cannot be used to satisfy the safe harbor contribution requirement of § VB with respect to more than one plan.

Section 1.401(a)(4)-1(c)(4) of the regulations provides, in relevant part, that a qualified plan must satisfy both § 410(b) and § 401(a)(4). § 1.401(a)(4)-l(c)(4) of the regulations also provides, in relevant part, that, consistent with this requirement, the definition of a plan subject to testing under § 401(a)(4) is the same as the definition of a plan subject to testing under § 401(b), i.e. the plan determined after applying the mandatory disaggregation rules of § 1.410(b)-7(c).

Section 1.410(b)-7(c)(2) of the regulations provides that the ESOP portion of a plan and the non-ESOP portion of a plan are treated as separate plans for purposes of Code § 410(b). Furthermore, pursuant to § 1.401(a)(4)-1(c)(4) of the regulations, each "separate plan" for purposes of Code § 410(b) must satisfy the nondiscrimination rules under Code § 401(a)(4). Thus, the ESOP portion of a plan and the non-ESOP portion of a plan must each separately satisfy the nondiscrimination rules of Code § 401(a)(4).

Section 1.401(a)(4)-1(b)(2)(ii)(B) of the regulations provides, in, relevant part, that a § 401(k) plan is deemed to satisfy this paragraph (b)(2) because § 1.410(b)(9) defines a § 401(k) plan as a plan consisting of elective contributions under a qualified CODA (i.e. one that satisfies § 401(k)(3), the nondiscriminatory amount requirement applicable to qualified CODAs). § 1.401(a)(4)-1(b)(2)(ii)(B) of the regulations maybe summarized as providing that the ADP and ACP tests are the exclusive means by which a CODA described in Code § 401(k) satisfies the Code § 401(a)(4) nondiscrimination rules.

Section 1.401(k)-l(g)(11) of the regulations provides, in relevant part, that a plan is a plan within the meaning of sections 1.410(b)-7(a) and (b) of the regulations after application of the mandatory disaggregation, rule of § 1.410(b)-7(c)(2).

On July 17, 2003, Proposed Income Regulations under Code sections 401(k) and 401(m) were published in the Federal Register (see 68 Fed. Reg. 137 at pages 42476 through 42532). The Preamble to the Proposed Regulations notes, in relevant part, that the mandatory disaggregations rule of § 1.410(b)-7(c)(2) of the regulations results in increased expenses and administrative difficulties for plans that contain both an ESOP and a non-ESOP. Thus, § 1.401(k)-1(b)(4)(v)(A) of the proposed regulations provides, in relevant part that the mandatory disaggregation rules relating to ESOP and non-ESOP portions of a plan set forth in § 1.410(b)-7(c)(2) shall not apply for purposes of this

Exhibit #1

section and sections 1.401(k)-2 through 1.401(k)-6. Thus, an ESOP and a non-ESOP which are different plans maybe aggregated for purposes of these sections.

The Preamble to the Proposed Regulations provides, in relevant part, that the regulations are proposed to apply for plan years beginning no sooner than 12 months after publication of final regulations in the Federal Register. However, plan sponsors may be permitted to implement final regulations for the first plan year beginning after their publication in the Federal Register.

As a result of the above cited law, in the present case, both the ESOP portion of Plan X and the non-ESOP portion of Plan X must independently satisfy the ADP and the ACP tests. Furthermore, since Plan X is intended to comply with the Code § 401(k) safe-harbor requirements, both the ESOP portion of Plan X and the non-ESOP portion of Plan X must independently satisfy the Code § 401(k) safe-harbor requirements.

ARGUMENTS:

Internal Revenue Service:

Pursuant to § 1.410(b)-7(c)(2) of the regulations, the ESOP portion of Plan X and the non-ESOP portion of Plan X are treated as separate plans for purposes of Code § 401(b). Furthermore, pursuant to § 1.401(a)(4)-l(c)(4) of the regulations, each "separate plan" for purposes of Code § 410(b) must satisfy the nondiscrimination rules under Code § 401(a)(4). Thus, the ESOP portion of Plan X and the non- ESOP portion of Plan X must each separately satisfy the nondiscrimination rules of Code § 401(a)(4).

§ IX A.4 of Notice 98-52 provides that safe harbor matching or elective contributions cannot be used to satisfy the safe harbor contribution requirement of § V.B with respect to more than one plan. Thus, the contributions made by Company A cannot be used to satisfy the safe harbor requirement with respect to both the ESOP portion and the non ESOP portion of Plan X

Taxpayer

Company A, through its authorized representative, concedes the applicability of the sections of the Code, regulations, and Notice 98-52 cited by the Service's Boston office. However, Company A asserts that there is an, inconsistency between Code § 401(k)(12)(F) and Notice 98-52 and that in light of the inconsistency, it is appropriate and reasonable to treat a mandatorily disaggegated plan as satisfying the Code section 401(k) safe harbor requirements as long as any other mandatorily disaggregated plan maintained by it satisfies said requirements with respect to the employees eligible under the fast mandatorily disaggregated plan. Thus, if either the ESOP portion of Plan X or the non ESOP portion satisfies the Code § 401(k) safe harbor requirements, then both should be treated as so satisfying.

Exhibit #1

In correspondence dated July 29, 2003, Company A also argues that the Proposed Regulations published in the Federal Register on July 17, 2003 and cited above, show a clear intent to no longer apply the rule, cited above, that each mandatorily disaggregated must independently satisfy the Code § 401(k) safe harbor rules.

Finally, in correspondence dated August 19. 2003, Company A argues that plan X should be treated as one plan at the time contributions are made to it because it is only after contributions are actually made to Plan X that they are allocated to the various funds thereunder pursuant to participant election(s).

ANALYSIS:

With respect to the first issue, we believe that, for purposes of filing Form(s) 5300, the facts, indicate that Plan X is one plan. We specifically note that all assets held in the trust(s) of Plan X are available to pay benefits under both (sub) plans of Plan X

With respect to the second issue, we note that as shown above, Company A has characterized Plan X as consisting of both an ESOP plan and a non ESOP (profit sharing) plan. Thus, we believe that it is disingenuous of Company A to now argue that for purposes of this issue, Plan X is a single plan. Furthermore, we believe that Notice.98-52 clearly requires Company A's safe harbor contributions to Plan X satisfy the safe harbor requirements of Code § 401(k) independently with respect to both the ESOP portion of Plan X and the non ESOP portion of plan X. Thus, neither portion of Plan X may satisfy the Code § 401(k) safe harbor requirements by bootstrapping itself on the other part of the Plan X. Finally, although the Proposed Regulations under Code § 401(k), cited above, do support Company A's arguments, they are not effective with respect to Plan X's plan year in question in this case.

CONCLUSIONS

Thus, with respect to your request for technical advice, we conclude as follows:

1. Although Plan X constitutes both a stock bonus plan and a profit-sharing plan for certain purposes, Company A need not file a separate Form 5300 application for each plan, and

2. the matching employer contribution formula set forth in § 2.2.1 of Plan X does not satisfy the § 401(k) of the Internal Revenue Code (Code) safe harbor requirements with respect to both the portion of the Plan X document that is an employee stock ownership plan (ESOP), and also with respect to the portion of Plan X that is not an ESOP where salary deferrals and matching employer contributions may be made to both portions of Plan X and where such Plan X is subject to mandatory disaggregation.

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Page 8 ABC Corporation Technical Advice Memorandum

We are returning your file along with additional information developed in this office. If you have any questions or seek additional Information, please contact Larry Reben (ID: 50-03192) at (202) 283-9618. His FAX number is- 202-283-9598.

Exhibit #2

Exhibit 7.13.5-21 (04-01-2003)
Letter 1399 (DO/CG)
Technical Advice Request Notice to Taxpayer

EDS Paragraph Numbers	Text
	Employer Identification Number: DLN: Person to Contact: ID#: Contact Telephone Number: Plan Name: Plan Number:
	[Salutation]
1 (Automatic)	We are going to request technical advice from our Washington D.C. Office about your employee benefit plan.
2 (Automatic)	Enclosed is a statement of the pertinent facts and questions we propose to send to the Washington D.C. Office. If you disagree with the facts as stated, explain your disagreement in writing. We will send your comments to the Washington D.C. Office with our request for technical advice.
3 (Selective)	The Internal Revenue Code requires the IRS to delete certain data from technical advice memoranda that are subject to disclosure under section 6110(a) of the Internal Revenue Code. When we send requests for technical advice, we must include either (1) a statement of the deletions the taxpayer proposes and the statutory basis for each proposed deletion, or (2) a statement that the only information that needs to be deleted is the names, addresses, and taxpayer identifying numbers. Please send us your statement of proposed deletions on a separate sheet so we can include it with our request.
4 (Selective)	Your request will be open to public inspection because it relates to the qualification of a plan or the tax exemption of the related trust (section 6104 of the Internal Revenue Code). If we need a statement about deletions, we will request it later.
5 (Automatic)	You are entitled to a conference in the Washington D.C. Office if the decision is adverse. Please let us know whether you want such a conference.

Exhibit #2

Exhibit 7.13.5-21 (Cont. 1) (04-01-2003)
Letter 1399 (DO/CG)
Technical Advice Request Notice to Taxpayer

3000–3999 (Selective)	Please mail the information requested in this letter to the following address: **(Addresses and instructions for use of these paragraphs to be provided by the EP-DCSC Office).**
5998 (Selective)	We have sent a copy of this letter to your representative as indicated in your Power of Attorney.
5999 (Automatic)	If you have any questions, please contact the person whose name and telephone number are shown above. Sincerely yours,
8500 (Automatic)	Paul T. Shultz Director, Employee Plans Determinations Redesign
8000 (Required)	Refer Reply to: [20V]
8001 (Required)	Required Response Date: [20V]
8501 (Automatic)	Enclosures: Statement of Facts and Questions Copy of this letter

Exhibit #3

Request for Technical Advice - TE/GE		(Check one) ____ EP Determination ____ EP Examination
1. TO: Internal Revenue Service Washington, D.C. 20224 (Check one) EP Technical _____ EP Actuarial _____	2. Special Handling? Yes:____ No:____ If "yes," attach memo (see instructions)	3. Date of Request 4. Mandatory Tech-Advice? Yes: ____ No:____
5. (a) From: Gary Runge (513) 263-3553	(c) TE/GE Office/Appeals Office Location Cincinnati, OH	6. Principal Code Section 401(a) (or as applicable)
(b) Signature	(d) Title: Manager, EP Determinations Quality Assurance Staff	7. Year(s) Involved
8. (a) Name and Telephone Number of TE/GE or Appeals Office Contact (Insert Agent's Name) (xxx) xxx-xxxx		9.(a) Statute Expires
(b) Name and Telephone Number of EP Area Manager, EO Area Manager or Associate Chief, Appeals Office or Manager, Examination Function (Insert AM Name), EP Area Manager, (Insert Name of Area here) (xxx) xxx-xxxx		(b) 270 Day Period Expires
10. Name and Address of Taxpayer or Organization		11. Identification No. (EIN or SSN)
12 (a) Name and Address of Representative (as stated on Power of Attorney/ Declaration)	(b) Area Code and Telephone Number of Representative	

Case Information	Check one Yes	No	N/A	Exhibit no. of attach-ment
13. General Information: (a) Was a Power of Attorney or Declaration provided? If "yes," please attach a copy…..				
(b) Was the taxpayer informed Technical Advice is being requested and did you explain the procedures? If "no," please attach a statement containing the reason…..				
(c) Does the taxpayer desire a conference with EP Technical or EO Technical if an adverse decision is indicated?.				
(d) Did you give the taxpayer a statement of facts and questions as your office sees them? If "yes," please attach a copy. If "no," please attach a statement containing the reasons....				
(e) Does the taxpayer agree with the statement? If "no," please attach the tax-payers statement of facts and questions…….				
(f) Has the taxpayer submitted a protest, brief, response, or other information. If "yes," please attach a copy……..…				
(g) Have you prepared a statement of applicable law, argument, and conclusion? If "yes," please attach a copy……..…				
(h) If subject to section 6110, did you ask for a statement of proposed deletions? If "yes," please attach a copy……..				
(i) Is there a pending technical advice request regarding the same taxpayer or organization? If "yes," please attach an Explanation…….				
14. Ruling or Determination Letter: (a) Does a prior letter relate to issues in this case? If "yes," attach a copy…….				

Case Information	Check one Yes	No	N/A	Exhibit No. of Attach-ment
(b) Is revocation or modification of a ruling or determination letter involved? If "yes," enter the recommended effective date of revocation or modification and attach a statement containing the reasons for such date. (Date)_____				
15. Previous Is the same issue involved in a prior case? If "yes," attach a statement explaining the disposition, including whether there was a prior revocation or disqualification..…				
16. Employee Plans Cases (a) Have you attached the administrative file and, if the request involved examination cases, attached the examination information folder (copies of returns, workpapers, supporting schedules, and actuarial reports)?				
(b) Is any issue pending before DOL or PBGC? If "yes," attach a statement containing the issue involved and other relevant information…….….....				
(c) If an EP examination case, has DOL been notified pursuant to the IRS-DOL Coordinated Agreement?…….….				
(d) If item 16(c) is "yes," has DOL commenced an examination?……				
17. Exempt Organization Cases: (a) Have you attached the case file (copies of enabling instruments, etc.)? …….				
(b) Is the organization a private foundation?…….				
18. LMSB, SB/SE or W&I Cases: Have you attached relevant workpapers and documents?……				

Form T5565 ☒ ……. Department of the Treasury – Internal Revenue Service

Exhibit #3

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